RECENT AMERICAN DECISIONS.

Superior Court of Cincinnati.

ISAAC W. PARKER ET AL. *v.* STEPHEN W. SIEBERN, AUDITOR, AND OLIVER W. NIXON, TREASURER OF HAMILTON COUNTY.

JAMES A. FRAZIER ET AL. *v.* THE SAME.

Tax upon the Owners of Shares of National Banks.—There is no valid objection to a state tax upon the owners of shares of stock in national banks, in common with other property in the state. And in estimating the value of such shares for purposes of taxation under state laws, it is not requisite to deduct that portion of the capital or property of such banks which is invested in United States stocks. The tax in such cases is an assessment upon the person of the owner, with regard to property, and in no sense a tax upon the bank or its capital.

THE petitions in these cases were filed in the Superior Court of Cincinnati in December 1865, stating that plaintiffs on and before 10th April 1865 were an association for carrying on the business of banking, under an Act of Congress, approved June 3d 1864, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," and had complied with all the requisitions of said act, and were entitled to all benefits and privileges which it secured. That the first-named association, with a capital of $304,000 paid in, divided into five thousand shares, had invested, according to the provisions of said Act of Congress, $299,150 in bonds and securities of the United States, exempt from state taxation, and that its other personal property did not exceed $60,000.

That the other association with a capital of $1,000,000, divided into ten thousand shares, had invested, according to the provisions of said Act of Congress, in bonds and securities of the United States, exempt from state taxation, of its capital the sum of $600,000, and otherwise in the course of business the sum of $1,439,050, and that the residue of its personal property, which might be subject to taxation under state authority, did not exceed $300,000. That the auditor of Hamilton county had assessed each shareholder in said associations, upon the duplicate of said county for taxation, the amount of his shares at their par value, without reference to the property of the association, which they claim that the shares represent. That the treasurer of Hamilton county is about to collect the tax assessed on said shares, viz.,

2 29-100 per cent. on the amounts thereof. That neither the Act of the General Assembly of the State of Ohio, passed 5th April 1859, entitled "An act for the assessment and taxation of property in this state, and for levying taxes thereon, according to its true value in money," nor the act amendatory thereto, passed 8th April 1865, under which said assessments are made, nor any act of the General Assembly of Ohio, did or could give authority to make said assessments or collect the same.

They claim to be allowed an exemption upon their shares in proportion thereof, to the bonds and securities of the United States held by the associations, instead of said shares being taxed at their par value, irrespective of the bonds and securities of the United States held by the associations.

They claim that the shares of banks organized under the authority of the state of Ohio are not taxed or required to be listed for taxation, and that individuals engaged in the business of banking, other than issuing notes for circulation, and otherwise employing moneyed capital, in listing their property for taxation, claim and are allowed an exemption as to the bonds and securities of the United States held by them, and that, therefore, the assessment on their shares will operate as an assessment of taxes under state authority, at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state of Ohio.

They pray for an injunction against the county auditor and county treasurer to restrain them from assessing or collecting said taxes. To which petitions the defendants demurred.

The cases were, at the January Term 1866, reserved to the court in General Term, for the opinion of all the judges upon the questions arising upon the demurrer.

Aaron F. Perry and *William T. Gholson*, for plaintiffs.

Wm. T. Scarborough, *Joshua H. Bates*, and *George Hoadly*, for defendants.

The opinion of the court was delivered by

STORER, J.—The questions presented by the pleadings lie within a narrow compass. There need be no discussion of merely constitutional powers, for every point that would seem by possibility to be involved, has not only been settled by the highest judicial

authority, but whether applied to the General Government or individual states, must be a necessary incident of sovereignty. We may dismiss, therefore, any argument to sustain the right to impose a tax, as well as to forbid the imposition.

However there may be a disposition at the present day with some tribunals, to announce *ex cathedra* what has been so long and so willingly approved by the profession, as if the foundations of our organic law had not yet been profoundly explored, and in the effort to enlighten, pages of mere axioms are read from the bench, we cannot perceive that the conclusions to which MARSHALL arrived, more than forty years ago, are made clearer or more consistent with sound reason by any modern jurist. We are content to follow so pure and just a man *haud passibus æquis*.

Assuming, then, that all bonds and other securities issued by the General Government are not the subject of state taxation, our inquiry is reduced to a single point: Can the shares of individual banks be taxed?

The power to tax is given in express terms by the forty-first section of the act to provide a national currency; but the same power would exist if the provision referred to had not been embodied in the act.

In all discussions where the taxing power of the state has been questioned, we find no claim asserted that the shares of individuals in the United States Bank were protected, because the capital and the business of that institution could not be assessed for state purposes. Judge MARSHALL, in *McCullough* v. *The State of Maryland*, 4 Wheat. 436, in announcing the unanimous opinion of the court declaring the law of Maryland imposing a tax on the bank to be unconstitutional and void, says, "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank in common with the other real property within the states, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state."

And Mr. Pinckney, the leading counsel for the bank, in his closing argument, admitted, "That the stock in the bank belonging to citizens of Maryland still continued liable to state taxation, as a portion of the individual property in common with all the other property of the state. The establishment of the bank, so

far from withdrawing anything from state taxation, brings some thing into it which the state may tax."

An examination of the cases in which the Supreme Court of the United States has from time to time considered these questions, will furnish no authority against the position which was maintained in the Court of South Carolina in *Bulow and Others* v. *The City Council of Charleston*, 1 Nott & McCord 527, and in *Berry and Others* v. *The Tax Collectors*, 2 Bailey 634. No appeal seems to have been taken by the bank to the ruling which imposed a tax upon the shareholders; but, on the contrary, the action of the state authority was not only submitted to, but virtually sustained by the acquiescence of those immediately interested.

There can be no doubt, from the law organizing national banks, as well as from various decisions upon questions analogous to the present, that a tax may be levied upon the shares held by individual shareholders.

But how the tax shall be assessed, and in what manner collected, presents another subject for consideration.

It cannot be doubted that the tax upon banking institutions must be equal, so far as it respects the percentage levied. No distinction can be permitted, or favor shown, to the domestic over the foreign corporation. This we consider to be the true exposition of the second section of the twelfth article of the Constitution of Ohio, which declares "that laws shall be passed taxing by a uniform rate all moneys, credits, investments in bonds, bank stock, joint stock companies, or otherwise," and our Supreme Court, in *City of Zanesille* v. *Richards*, 5 Ohio St. 589, decided that this provision "requires a uniform rate per cent. to be levied upon all property according to its true value in money."

The tax must not only be uniform, but assessed alike upon the same property, whether owned by residents or non-residents.

It is admitted that the county auditor, in May last, having applied to the proper officers of the bank, obtained the names of the shareholders in these institutions, and the number of shares owned by each; that each share was assessed at its nominal value and placed on the grand levy for taxation.

This, it is claimed, was done under the fourth section of the amendatory law of April 6th 1865, which requires "all shares

of stock in any national bank located within the state, whether held or owned by residents or non-residents, should be listed for taxation, and taxed in the city or county in which the bank is located."

This would seem to be in harmony with the power already given by the forty-first section of the act establishing the national banks; indeed, it is in strict conformity, unless the assessment is invalid upon other grounds.

It is not pretended that the per centum of tax levied is greater than that paid by other moneyed institutions in the state; but it would seem rather, if any discrimination existed, it was largely in favor of national banks. Thus the state institutions are assessed upon their capital stock, undivided profits, and all other means not forming part of their capital; while the national banks are not taxed as such, but the shares of individuals only, irrespective of all profits earned, are assessed. No authority is assumed by the state to tax the capital of these institutions, as it is composed altogether of United States bonds, which are exempted by law.

It is said by counsel, if the shares in the state banks are not taxed, there is no propriety in taxing the shares in the national banks. This supposed incongruity is readily explained when we are assured the tax imposed on the stockholders of the latter institution is not equal to that which is borne by those who hold shares in the former, and, therefore, there is no inequality in the burden. The apparent difference is in the mode. Besides, it is not true that the assessment of this tax can only be made when similar property, by the same designation, is subjected to taxation held by individuals in state institutions. No such condition is required by the statute, and we cannot see that any sound reason exists to forbid the levy.

An ingenious, but as we apprehend, an erroneous view has been presented in the argument, which, if sustained, would virtually place the shares of stock and the capital within the protection of the law which withholds the latter from taxation. It assumes that the stock originally subscribed and the original interests of the shareholders are identical; that the value of the shares depends upon the full enjoyment of all the privileges attached to the national banks by their organization, and the power, therefore, to impose a burden upon the owner of shares

must necessarily affect the corporation itself, lessen the immunity it claims to possess, and thus indirectly assess the capital.

It is argued further that this right to tax, if admitted, would lead to oppression, as it will be discretionary with the state how far it shall extend, and if allowed would endanger if not destroy the franchise.

These objections cannot, we are satisfied, be sustained by the facts before us, nor can we fairly anticipate any ground of future difficulty. We are not to believe the legislature will act a dishonorable part in so important a matter, where the interests of the state are immediately involved, or disobey a provision of the constitution which prohibits the imagined wrong. This argument at best is "*ab inconvenienti*," and can only be resorted to when all others have failed. We must never presume power not delegated will be usurped; if it should be, the judiciary would at once restrain the assumption.

But the shares in these national institutions are not a part of the capital. A deposit is made with the treasury department in United States bonds, to the amount of the stock subscribed, and bills representing currency are issued to the bank. It is on this circulating medium thus received, as well as on their deposits, discounted notes and bills, that the profits of the shares accrue. It is then but the levy of a percentage upon the means which produce these profits that is claimed by the state.

If, however, they are freed from the general burden on the hypothesis urged by counsel, an individual has but to invest his whole estate, however large, in these institutions, while the government, which immediately protects his property, and allows him to vindicate his rights in her tribunals, can derive no benefit from his estate; in reality he will bear no part of the public burdens.

Nor do we think the objection that the shares are not assessed at their real value can be sustained, as the auditor has placed them upon the duplicate, at the sum they stand credited on the books of the bank, as prescribed by the 12th section of the act which gave these institutions their corporate existence. Such a construction of the statute would necessarily confer very extensive power, and lead to great uncertainty in the mode of taxation, besides furnishing a standard to determine values in these days of stock gambling, not by any fixed rate, but rather by the caprice of speculators.

It is not alleged that the shares are valued too high, and we presume it could not with any truth be so affirmed, nor are any data assumed by which a more accurate and impartial assessment could be made. True it is, several theories are suggested by which supposed injustice might be avoided, but we must view the questions before us in their practical applications; we ought not even to imagine wrong to exist until the facts proved in the case will necessarily lead to such a conclusion.

As taxation is an essential attribute of sovereignty, all property is liable to be assessed for public purposes. If any exception exists, the reservation from the general burden is jealously guarded. There can be no implication where the exception is required to be expressly made.

The proposition that the shares in these banks are so identified with their capital that they in reality represent it, has been fully considered in the case of *The City of Utica* v. *Churchill and others*, decided a short time since by the Supreme Court of New York, and which was affirmed on error by the Supreme Court of the United States at their late session, that we do not feel required to discuss the question anew. We fully accord with the opinion of the majority of the court in the latter case, and that of Judge SELDEN in the former.

In thus deciding, we are satisfied we do nothing to impair the authority of the General Government, or lessen, in the least degree, our solemn obligation as a judicial tribunal to uphold the law, while we sustain in its full integrity our national credit. Our first duty, we admit, is to preserve the Union, but we must not, in our devotion to the national unity, forget that it is composed of individual states.

The foregoing opinion of Mr. Justice STORER is upon a subject of very great interest to the several states, since exempting all the bank stock in the country from all state taxation, even as a source of income, in common with other sources of income, in addition to all National stocks, will reduce the range of state taxation, in many districts, within very narrow limits. It will extend scarcely beyond the land and goods and chattels in possession. This is, indeed, no reason why it should not be exempted, if the fair construction of the National Constitution requires it. But it affords good cause for careful consideration before taking a step so essentially limiting the range of state taxation.

The case, so far as any impediment to levying the tax arises from the conflict between National and state sovereignty, must turn upon the same

questions as that of *Bank of Commerce* v. *New York City*, 2 Black 620, and the case of *Bank Tax*, 2 Wallace U. S. 200. And the only earlier cases, in the Supreme Court of the United States, bearing directly upon the same question, are *McCullough* v. *State of Maryland*, 4 Wheat. 316, and *Weston* v. *The City Council of Charleston*, 2 Peters 449. The case of *Osborne* v. *The Bank of the United States*, 9 Wheat. 738, being regarded as almost identical with *McCullough* v. *State of Maryland*.

It is scarcely necessary to say that as the powers and functions of the National Government have become very much extended since those early decisions in regard to taxation were made, it is but natural, perhaps, that the constructions and decisions of the Supreme Court should have correspondingly changed.

At the time of the discussion of the case of *McCullough* v. *Maryland*, at the February Term 1819, after argument by the ablest counsel, perhaps, which the republic has ever produced, Mr. Webster, Mr. Wirt, and Mr. Pinckney, for the United States; and Mr. Hopkinson, Mr. Jones, and Mr. Martin, for the State of Maryland; and, after mature consideration by the court of last resort, embracing among its members many of the ablest and wisest judges who have ever adorned any judicial tribunal; men cotemporary with and sustaining the most intimate relations toward the framers of the National Constitution, and within comparatively a few years of its adoption; under these favoring accidents for obtaining thorough and correct views of its import and fair construction, no pretence was put forth, even by way of argument or illustration, verging in the remotest degree towards the exemption of the shareowners of the bank from liability to state taxation. But it was expressly conceded in the argument and assumed by the court, in giving their opinion and judgment, that this exemption did "*not extend to a tax paid by the real property of the bank, in common with other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state.*" The tax there held invalid was a stamp-tax imposed upon the issues of the bank, amounting to one per cent. upon its entire circulation, unless the bank should pay fifteen thousand dollars annually, in advance, to the treasurer of the state, as a bonus or royalty upon the privilege of exercising banking powers within the state. Chief Justice MARSHALL, in conclusion, puts the decision expressly and exclusively upon the ground that "this is a tax on the *operations* of the bank, and is, consequently, on the operation of an *instrument* employed by the Government of the Union to carry its powers into execution."

And in *Osborne* v. *The Bank of the United States*, 9 Wheat. 738, where the whole ground is again reviewed by the court, the question arose upon an assessment made directly upon *the bank*, and which the treasurer of the State of Ohio was proceeding to collect, by distress, upon the deposits in the bank, and the court declare that "the bank is not considered as a private corporation, whose principal object is trade and individual profit, but as a public corporation, created for public and national purposes." "The whole opinion of the court in the case of *McCullough* v. *The State of Maryland*," said the learned judge, "is founded on and sustained by the idea that the bank is an *instrument* which is necessary and proper for carrying into effect the powers vested in the Government of the United States." The entire argument of this distinguished luminary of American constitutional law, in this case and that

of *McCullough* v. *Maryland*, extending over more than fifty pages, upon all the questions involved, is made to turn exclusively upon the idea of the distinction between a *specific tax upon the bank itself and its operations* and a general one upon its property or shares in common with other similar property in the state; the former being susceptible of being so extended and enlarged, if its validity is maintained, as to annihilate the bank as one of the *indispensable instruments of the National Government.*

And this point is perhaps still more distinctly brought out in the discussions upon the case of *Weston* v. *The City Council of Charleston*, 2 Peters 449, both in the state court and the national tribunal of last resort. Judge HUGER, of the Constitutional Court of South Carolina, who, with two other judges, dissented from the decision of the state court maintaining the tax, in a very able opinion, maintains that the tax in that case is a tax *eo nomine*, and specifically upon the United States stocks. And the case is placed by Chief Justice MARSHALL and the majority of the national court upon the same ground; while the dissenting opinion of Mr. Justice THOMPSON, in that court, is put upon the ground that the tax in that case was really nothing more than a tax upon the *owner of the stock*, on account of the income derivable from it. This shows how well agreed the different members of the court at that time were upon the principles upon which the cases, up to that time, had proceeded. There was not, at that time, supposed to be any objection to a state tax upon income, because it was derived from a loan to the National Government, provided this income were taxed only in common with income from other sources. But the objection to a specific tax upon any of the instruments of the National Government was, in its very nature, susceptible of an indefinite increase at the will of the states, so as, in effect, to extinguish the action of that government, if allowed.

But now that the results of national development have shown the convenience of multiplying national governmental functions, the same court hold, that no citizen or state corporation, within any of the states, can be taxed for income derived from any of the instruments of the National Government, and especially from its public stocks. It seems to us that this principle, carried to its legitimate results, will render state taxation very unequal, and that it is not in any just sense required by the necessities of the National Government. The court in the case of *Bank of Commerce* v. *New York City*, 2 Black 620, where this principle is first established, seem to place the decision mainly upon the ground that it will be impracticable for the national courts to protect the instruments of the National Government from destructive taxation unless they go the whole length of declaring United States stock exempt from the jurisdiction of the states, as a source of taxation, either directly or indirectly; that if the owners of the stock are allowed to be taxed for the income derived from it, the same evil consequences, except in a less degree, will follow, as if the tax were imposed upon the stock itself. This conjectural result seems to us merely imaginary, and, like all arguments *ab inconvenienti*, more specious than sound.

There is no principle better established than that a state may tax its inhabitants for income derived from the stocks of foreign corporations, or the public stocks of other states or countries. And this power of taxation exists wholly independent of any jurisdiction over the corporations or the stock itself. It is a merely personal tax, like a poll-tax. There is no limit to the right of personal taxation. It may be made to depend upon a thousand incidents almost; upon occu-

pation, or age, or property: and, in the latter case, it is wholly unimportant whether the property, so far as personalty is concerned, is within the jurisdiction of the state or not. Personal property is a mere incident of the person. It has always seemed to us, therefore, that the state should not be restricted in imposing an income tax upon its inhabitants, so as not to embrace income derived from loans to the National Government, as well as from all other sources. It has always appeared to us that any such restriction was an entire departure from the first principles upon which the exemption from taxation of certain instruments of the National Government were based, and at the same time the adoption of a principle of exemption from taxation which, while it resulted from extreme over-caution on the one hand, evinced a kind of disregard to the consequent embarrassments produced upon the other hand, which exhibited a degree of one-sidedness in the action of the national tribunal of last resort in painful contrast with the cautious and delicate circumspection exhibited by the court in its earlier discriminations in favor of exclusive national sovereignty and of the consequent curtailment of the sovereignty of the states, which it is the more alarming to perceive just at a time when the harmonious action of the state and national governments is liable at any moment to be irretrievably disturbed. But we understand also, and rejoice to remember, that all this apprehension on our part may proceed from wrong bias or want of full comprehension of the difficulties and dangers lurking under the form of taxation by way of income. To us it seems very certain that no danger could come from that mode of state taxation, and that the denial of it will be more likely to produce a revolution in the very framework of the government, than any other principle yet sanctioned by that court. We have felt the more disappointment at the advance of that tribunal in that direction, from the entire confidence which we feel in its wisdom and purity, and from our extreme gratification at some of its other recent decisions, which evinced such an abiding firmness and far-seeing comprehension in the discovery and maintenance of the just principles of liberty and justice.

We have presented the foregoing views in order to justify the suggestion that as these national banking associations are allowed to be formed, as part of the scheme "to provide a national currency, and for the circulation and redemption thereof," as among the *agencies and instruments* "necessary and proper for carrying into effect the powers vested in the government of the United States" by the Constitution; and as, according to the argument of the court upon that point in *McCullough* v. *Maryland*, *supra*, they could only be justified upon that ground, we do not well comprehend why it may not be as consistent, to exempt the owners of shares in such banks from all state taxation, on the ground of income derived therefrom, as in the case of the former United States Bank, or of the public stocks of the nation. But for the decisions in the more recent cases in the Supreme Court, already alluded to, we should have supposed the decision in the principal case most unquestionable; and we still trust the Supreme Court will find some good way to distinguish this case from that of *Bank of Commerce* v. *New York City*, *supra*, which does not readily occur to us, short of ruling these national banks "unnecessary" for governmental purposes, and, by consequence, unconstitutional: or if they cannot find any good way of escape in this direction, that they may be induced to retrace their steps towards the old foundations.

I. F. R.